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No. 460

Supreme Court of the United States

OCTOBER TERM, 1958

J. W. McDAVID,

PETITIONER

FORD MOTOR COMPANY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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November 15, 1958.

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QUESTIONS PRESENTED

The Fourth Circuit Court in the first paragraph of its Opinion stated: "The appeal presents the question of the sufficiency of the proof to support the verdict." This is also the question presented by the Petition although Petitioner distorts the question by stating (Petition page 2):

> "The sole issue raised in this petition is whether or not an appellate court is to be allowed to substitute its judgment for that of a jury in a case in which there

is a reasonable inference of a manufacturer's negligence."

The assumption by Petitioner of the very point in question by the statement above is so patent as to require no extended criticism by Respondent.

Petitioner goes on to cite the alleged "increasing divergence in views between Circuit Courts as to the role of the jury." This "divergence" is nowhere substantiated in the Petition and appears to be a figment of Petitioner's imagination. Similarly the charge that the Fourth Circuit failed to apply the South Carolina rule is without merit in the light of the authorities hereinafter cited.

The real question presented by the Petition is more essentially whether or not Petitioner has succeeded in bringing himself within the purview of Supreme Court Rule 19—1-(b), which, though not controlling on the Court's discretion, serves as a guide to the bar in seeking the exercise of *certiorari* jurisdiction. With due regard for the finality of the Court's discretion, Respondent respectfully submits that Petitioner has not advanced a meritorious reason for the granting of the writ in the light of the above Rule.

In addition to the question which Petitioner raises as presented by the Petition, there are three additional questions presented which concern additional grounds on which the decision of the Circuit Court could have rested:

(1) Assuming that the maladjustment of camber originated at the Ford factory, was the possible resulting inference of negligence rebutted to such an extent that no reasonable inference of negligence or lack of due care remained?

(2) Was there no reasonable inference that the acts intervening between the factory and the accident could be foreseen by Ford Motor Company so as to preserve the

unbroken causal relationship required between Respondent's act and Petitioner's injury?

(3) Was there no reasonable inference that Respondent could foresee as a probability an injury resulting from its act, thus no reasonable inference of a proximate relationship between act and injury?

Respondent submits that each of the questions above must be answered affirmatively and constitute additional grounds on any one of which the Circuit Court decision could have rested.

Mindful of the requirements of Rule 15 (1)-(c) (1) as to brevity, Respondent nevertheless feels obligated to guard against the possibility of summary reversal along with the grant of the Petition by respectfully noting herein that the Circuit Court found it unnecessary to consider nine separate exceptions to the proceedings of the District Court, any one of which, if affirmed, would have entitled Respondent to a new trial. *

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* I. Did the District Court err in refusing to strike the following allegations from the Complaint: (a) The following from Paragraph 3: "* * * which vehicle was represented to be and should have been free from all mechanical defects"; (b) All of subparagraph "c" of Paragraph 5, as follows: "In representing or causing to be represented to plaintiff's wife that her said motor vehicle was in good condition"; (c) All of subparagraph "a" of Paragraph 5, as follows: "(a) In allowing a mechanical defect to remain in the said vehicle, which defect caused extensive wear on the tires of the said vehicle resulting in one of the tires blowing out"?

II. Did the District Court err in charging Plaintiff's Sixth Request to Charge as follows: "I charge that if you find that the manufacturer of this automobile negligently permitted it to be delivered to the dealer with an improper camber adjustment which resulted in tire wearing to the cloth, while being driven by the buyer, the manufacturer would be liable to any one injured in an accident resulting directly and proximately I add, from the manufacturer's negligence, notwithstanding inspections or changes made by the dealer from whom the automobile was purchased."?

III. Did the District Court err in charging Plaintiff's Eighth Request to Charge as follows: "In order for a cause to be a superceding cause, it must entirely supercede the operation of the negligence of the defendant so that such cause alone, without the defendant's negligence contributing in the slightest thereto, in fact produced the injury"?

IV. Did the District Court err in refusing to Charge: (a) The second sentence of Defendant's Second Request for Charge, the entire second request being as follows: "I charge you, Mr. Foreman and Gen-

STATEMENT OF THE CASE

Petitioner's Statement of the case (Petition, pages 2-5) is not that "concise statement of the case containing the facts material to the consideration of the questions presented" called for by Rule 23 (1) (e). It incorporates instead an inaccurate and argumentative dissertation on the merits and as such is not acceptable to Respondent.

It is manifest that the presentation of all facts material to the question of whether or not a jury issue was presented would require an exhaustive detailing of the testimony of all the witnesses so that the Court could judge for itself whether there were such conflicting reasonable inferences as would require submission to the jury. Rather than unduly burden the Court with a statement of this type or attempt to correct what are regarded as inaccuracies in Petitioner's Statement, reference is craved to the Fourth Circuit Court Opinion, reprinted in the Appendix to the

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tlemen, that, if you should find that the damage claimed by the plaintiff, if any, was not the proximate result of negligence on the part of the defendant, but was the result of some act of some third person, then you must find for the defendant. If you should find in favor of the defendant, Ford Motor Company, your verdict would not bar the plaintiff from proceeding against any other person or firms whose alleged negligence may have caused such injuries as he may have received."; (b) Defendants' Sixth Request for Charge which was identically the same as the second sentence of the Second Request as set forth above?

V. Did the District Court err in charging the jury that the Defendant admits it has agents within the State of South Carolina and within the jurisdiction of the Court?

VI. Did the District Court err in charging the jury as follows: "So, as I see this case, the sole question here is whether or not the defendant's negligence had a causal relation to the plaintiff's injuries; whether the defendant was negligent and whether or not that negligence occasioned or brought about the injuries of which the plaintiff complains; that is, brought it about as an immediate, proximate, efficient cause of it, and without which what plaintiff complains of would not have happened. That is what the plaintiff must establish."?

VII. Did the District Court err in permitting the introduction of testimony as to what the Bear Manual showed regarding types and causes of tire wear?

VIII. Was the verdict so excessive as to indicate prejudice, caprice, passion or other considerations not founded on the evidence?

IX. Was the defendant prejudiced by the District Court's examination of each of Defendant's witnesses and by various comments of the Court during the course of the trial?

Petition, which sets out with reasonable thoroughness the essential facts necessary for consideration of the questions presented.

ARGUMENT

At the outset, Respondent submits that Petitioner has not advanced a meritorious argument for the granting of the writ. On the contrary, as will be pointed out, every aspect of the case militates against the granting of the writ. The case turns upon its own particular facts and as such, presents a narrow question of evidence which affects no one other than the litigants. No federal question is presented, no constitutional issue, and no issue which requires for sake of uniformity the guidance of an opinion by this Honorable Court. Moreover, there is no conflict of decisions on the issues presented, nor is this by any stretch of the imagination a subject of great national moment or public interest. Lastly, the result is inherently just and right and is supported by the law of South Carolina as well as the general law elsewhere. Respondent respectfully urges that under these circumstances the petition should be denied.

There are several points made by Petitioner in his Statement which must be corrected in order to set the record straight.

First, Petitioner states that suit by Mrs. McDavid in the South Carolina state court resulted in a jury verdict for Mrs. McDavid which was paid after appeal was abandoned (Petition, page 2). This is inaccurate. Mrs. McDavid's case was compromised while appeal was still pending.

Secondly, the Petitioner states that the record shows that the camber adjustment was made by Ford and was not thereafter changed by the two Ford dealers who serviced the car. As is so aptly pointed out, however, by the

opinion of the Court of Appeals, in the light of the thoroughness of the factory procedures and the four separate inspections of camber which ensued, the only reasonable inference is that the camber adjustment was correct and required no change by the dealers who inspected the car. It may be added parenthetically that the service instructions did call for the subsequent checking of the camber setting and Petitioner's implication to the contrary is erroneous.

Throughout the history of the case, Petitioner has had the marked tendency to assume that the maladjustment of camber occurred at the factory. This is striking in the light of the fact that Petitioner did not present any testimony whatsoever to refute the testimony of Respondent as to the care exercised at the factory. Nor could Petitioner produce one witness to refute the fact that camber-setting had been repeatedly checked thereafter for accuracy. Indeed Petitioner attempts to overcome the convincing effect of this evidence by testimony that after the accident inspection did not show any prior damage to the steering mechanism or misuse of the car while driving. Obviously this cannot have the effect of showing that the camber maladjustment occurred at the factory. Just as apparent is the fact that just because Mrs. McDavid could not recall any mishap this could in no wise establish that the factory had not set the camber properly. Actually her testimony was most helpful in establishing just the contrary inference (Appendix to Petition, page 20). Petitioner's insistence that camber would be improved by the car striking a hole, incorrectly assumes that every lick or bump comes from only one direction, namely, that direction which would tend to reduce a positive camber maladjustment. To the contrary, substantially all of the blows to or forces exerted against a wheel and tire come from the outside and are directed at the lower portion of the tire

which would tend to **increase** the positive camber, such as bumping or striking a curb either in angle or parallel parking or hitting any other immovable or fairly stationary object.

The unusual wear on the right front tire may perhaps have been caused by improper camber, though the weight of the testimony was to the contrary, but Petitioner simply failed to carry the burden of proving Respondent's responsibility for this condition.

I

The Circuit Court did not misapply the South Carolina Law.

The Circuit Court chose to rest its decision on the ground that the inference that Ford was responsibile for the wheel misalignment was so tenuous and conjectural as not to merit submission to the jury. That the *South* Carolina decisions support this rationale is quite clear and Petitioner's insistence that the South Carolina rule was violated is without merit.

In *Attaway v. One Chevrolet 5-P Truck*, 228 S. C. 559, 91 S. E. (2d) 270 (1956), the action was based on allegations of negligence in the loading of a truck from which a mattress fell, indirectly causing plaintiff's injury. The Supreme Court of South Carolina, in affirming a nonsuit, noted certain testimony to the effect that the mattress had been seen bouncing around on the truck just prior to the accident. After stating that the fact that the mattress fell from the truck was of itself insufficient to show negligence in the loading, the Court went on to say:

> "Of course, an issue may be proven by circumstantial evidence, but for such evidence to be sufficient to warrant a finding of fact, it must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference

and not mere speculation. Such facts and circumstances must be reckoned with in the light of ordinary experience and the conclusions deduced therefrom by such as common sense dictates, and not rest upon speculation, surmise, or conjecture. *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459; *Holland v. Georgia Hardwood Lumber Co.*, 214 S. C. 195, 51 S. E. (2d) 744."

In *Weston v. Hillyer*, 160 S. C. 541, 159 S. E. 390 (1931), nonsuit was affirmed, the Supreme Court holding that verdicts cannot rest upon guess or conjecture, it being plaintiff's duty to prove negligence affirmatively. Again, in the case of *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459 (1940), the Supreme Court, in reversing judgment for plaintiff and granting judgment in favor of defendant, stated: "The Plaintiff was bound to show something more than that Defendant was possibly responsible for the decedent's death in order to entitle him to a verdict."

Other South Carolina authority could be cited for the proposition that verdicts cannot rest on mere speculation and conjecture. Indeed the Circuit Court makes ample reference to other authorities. But this is a matter of general law which requires no further substantiation.

Petitioner would have this Honorable Court believe that the South Carolina rule differs somewhat from that in some other jurisdictions as to the submission of cases to a jury. (See Petition, page 7.) Since he cites no authority on the point from other jurisdictions, Respondent is not prepared to say that this statement is erroneous. Respondent is prepared to say, however, that the South Carolina rule is the same as the general rule elsewhere, that is, that unless there is a reasonable inference of a defendant's responsibility for an injury, the case will not be allowed to go to the jury. Examination of the so-called "scintilla" rule

to which Petitioner has referred shows that a "scintilla" has been defined by our Supreme Court as "any material evidence which if true would tend to establish the issue in the mind of a reasonable juror." *Woodle v. Brown*, 223 S. C. 204, 74 S. E. (2d) 914 (1953). This is nothing more than the requirement of the finding of a reasonable inference just as *Hiers v. South Carolina Power Co.*, 198 S. C. 280, 17 S. E. (2d) 698 (1941), implies when it states that submission to the jury is warranted "if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways."

Of interest is the analysis of the scintilla rule by Judge Lanneau D. Lide, one of the most revered judges ever to sit on the bench in South Carolina. Writing in Volume I of the South Carolina Law Quarterly, at page 213, Judge Lide noted the vanishing scintilla rule and concluded that it could scarcely be regarded as of effect in view of the pronouncements of the South Carolina Supreme Court on the subject. He noted the holding of *Johnson v. Metropolitan Life Ins. Co.*, 206 S. C. 415, 34 S. E. (2d) 757 (1945), that the scintilla of evidence must be real, material, pertinent and relevant, not speculative or theoretical deductions. He further called attention to *Jester v. Southern Railway Co.*, 204 S. C. 395, 29 S. E. (2d) 768 (1944), in which a unanimous Supreme Court, after stating the Federal rule, held that the same "is in line with the rule of law prevailing in this state governing the granting of nonsuits and directions of verdicts, although theoretically this Court adheres to the scintilla rule". Judge Lide concludes, "The rule of reason as applied in both the Federal Court and the State Court is substantially the same."

Although it is quite clear that the South Carolina rule does not differ from the Federal Rule, the matter is aca-

demic in any event since Rule 50 of the Federal Rules of Civil Procedure, which has to do with motions for a directed verdict, is a procedural rule. Thus "the state rules of practice have no application to the practice in federal courts with respect to the submission of jury issues, the direction of verdicts or the sufficiency of the evidence to sustain a verdict upon a motion for directed verdict." Barron and Holtzoff, Federal Practice and Procedure, Vol. 2, p. 755.

II

The decision in this case turns on its own facts and affects only the litigants.

Since the questions presented are concerned only with the sufficiency of the evidence to go to the jury, it is clear that the decision in the case would have no effect on other cases which would of necessity stand or fall on their own evidence. It need hardly be said that only rarely are cases identical in factual and evidentiary content. It therefore follows that the decision in this case affects only the litigants and no others.

III

There is no important federal question involved.

It is manifest that there is no important question of Federal law involved in this decision. There are no statutes involved, no constitutional issues, in short, nothing to distinguish this case from the great mass of diversity cases brought in the Federal Courts in which verdicts are directed by the Court.

Petitioner attempts to produce a question by stating that this Court must decide whether an appellate court can usurp the jury's function in a case in which there is a reasonable inference of a manufacturer's negligence. The fact of the matter and the basis of the Fourth Circuit Opinion is that there was no such reasonable inference.

IV

There is no conflict of decisions.

Petitioner nowhere seriously contends that there is a conflict between the Circuit Courts on the questions presented. Indeed since the decision turns on its own particular facts there could not logically be such a conflict. It is insisted that *Pierce v. Ford Motor Company*, 190 F. (2d) 910 (C. C. A. 4th, 1951), cert. den., 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666 and *Ford Motor Company v. Mahone*, 205 F. (2d) 267 (C. C. A. 4th, 1953), are identical on the facts and are the cases most persuasive of Petitioner's position. Those two cases actually arose out of the same accident and are from the same circuit as the instant case, the Fourth Circuit. The *Pierce case* is quite amply distinguished by the Circuit Court in its opinion. In point of fact, however, even were the cases in conflict, which they are not, the present case would be deemed controlling since it is the latest expression of the Fourth Circuit Court on the matter.

Petitioner's citation of cases from other Circuits in which there may have been a jury issue is certainly irrelevant to this case which involves entirely different facts. There is no dispute between the Circuits as to the fact that verdicts can rest on circumstantial evidence where such evidence establishes a reasonable inference. Nor is there dispute on the rule that verdicts cannot rest on speculation and conjecture. Petitioner has not cited any authority holding that a jury verdict must stand where there was no reasonable inference of a defendant's responsibility for the injury. This is patently because these matters governing directed verdicts and sufficiency of the evidence are uniformly interpreted and applied by all the courts of this land.

There being no conflict of decisions, it appears that Petitioner seeks review of a lower court decision which turned solely upon an analysis of the particular facts involved, there being no real dispute as to the factual background of the case. In effect, Petitioner simply wants another hearing of the matter. Respondent respectfully submits that Petitioner misconceives the role of this Honorable Court in the federal system and the factors which motivate the granting of *certiorari*.

V

The decision below was correct.

Respondent would not have the temerity to try to improve on the Fourth Circuit's analysis of the first question presented. The opinion is eminently clear and decisive in its analysis of the matter and thoroughly substantiated by the authorities cited. Attention will therefore be directed to the other grounds on which the Circuit Court could have reached the same result.

(1) *Assuming that the maladjustment of camber originated at the Ford factory, was the possible resulting inference of negligence rebutted to such an extent that no reasonable inference of negligence or lack of due care remained?*

Had it been proved that the maladjustment actually occurred at the factory, this may have raised an inference of negligence and placed upon the manufacturer the duty of showing due care in its processes. If so, this burden was met by the unrebutted showing of due care used at the factory in checking and setting the proper adjustment. (Pages 84, 85 of the Joint Appendix.) Defendant's witness Riding, experienced in the factory procedures, testified as to the unusual degree of care exercised. Not only was each car checked for camber adjustment by machine, but also

the machines themselves were checked every four hours for accuracy. When a machine was found to have deviated from the norm, all cars on the line since the last satisfactory check were rechecked manually for camber adjustment.

Petitioner did not contest in any way whatsoever the testimony above. Not until appeal did he belatedly challenge the expert's qualifications. Never was an attempt made to challenge the reasonableness of the methods. Under the circumstances, no inference of negligence remained to go to the jury and Petitioner failed to sustain the burden of persuasion which again rested upon him.

(2) *Was there no reasonable inference that the acts intervening between the factory and the accident could be foreseen by Ford Motor Company so as to preserve the unbroken causal relationship required between Respondent's act and Petitioner's injury?*

Even assuming that Respondent negligently maladjusted camber, this negligence was insulated by subsequent acts. The South Carolina decisions hold that when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. *Carter v. Atlantic Coast Line Railroad Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411 (1918); *Martin v. Southern Ry.*, 77 S. C. 370, 58 S. E. 3 (1907); *Miller v. Atlantic Coast Line R. Co.*, 140 S. C. 123, 138 S. E. 675 (1926). And *Locklear v. Southeastern Stages, Inc.*, 193 S. C. 309, 8 S. E. (2d) 321 (1940), holds that the intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care.

It is a mechanical fact of life that when the steering mechanism on the Petitioner's car was changed from power steering to conventional steering by Clem Davis, Inc., the factory toe-in adjustment was obliterated. Whatever toe-in adjustment was made on the new unit was made by Clem Davis, Inc. or some subsequent person. If toe-in became maladjusted thereafter it was due to the intervention of some independent, efficient agency other than Ford.

That toe-in is the most serious element in the tire wear was nowhere denied. It is a fact that tires with improper toe-in have been known to wear out in 100 miles (Page 56, Joint Appendix). Plaintiff's own expert stated that it would have taken at least 5,200 miles for positive camber alone to have caused the wear on the McDavid tires (Page 38, Joint Appendix). New tires of the same make and type on the same type car showed virtually no wear from having been run 3,501 miles on the test stand with proper toe-in but camber maladjusted to the greatest extent mechanically possible (Pages 99-101, Joint Appendix). The appearance of the actual tire which blew out established that the major cause of wear was the toe-in. The only reasonable inference to be drawn concerning a blowout at 2,600 miles is that the independent and efficient agency of improper toe-in intervened to cause the blowout, and such agency must inevitably be deemed the direct or proximate cause, and the camber maladjustment, if any, and if it resulted at the factory, the indirect or remote cause.

Nor could the intervention of this agency be reasonably foreseen. We are not dealing here with the failure of a dealer to carry out his duty of inspection which admittedly would not relieve Ford if the original negligence had been the work of Ford. We are dealing instead with some positive action which maladjusted toe-in, occurring long after the car left the factory. It could not reasonably have been

foreseen by Ford and thus had the effect of relieving any original responsibility which we assumed Ford to bear for purposes of this argument.

In addition to the above, Respondent submits that prior to 2,600 miles of operation, a duty of inspection and replacement if necessary devolved upon the owner of the car, Petitioner's wife. Her failure to exercise due care with respect to the tires on the car is such negligence as would relieve Respondent of liability.

(3) *Was there no reasonable inference that Respondent could foresee as a probability an injury resulting from its act and thus no reasonable inference of a proximate relationship between act and injury?*

It is clear that Respondent's liability must be predicated on a proximate relationship between act and injury even if negligence be admitted. It is insufficient to say that but for the act the injury would not have occurred. This may establish actual causation but not proximate causation. Restatement of Torts, Section 431, page 1159; Prosser, Handbook of Law of Torts, (2d) E., page 220. One must go further and examine the test of proximate causation as laid down by the South Carolina Supreme Court. This test is as follows: Was the injury a natural and **probable** consequence of the wrongful act, and ought it to have been foreseen in the light of attendant circumstances? *Scott v. Greenville Pharmacy*, 212 S. C. 485, 48 S. E. (2d) 324 (1948); *Hicklin v. Jeff Hunt Machinery Co.*, 226 S. C. 484, 85 S. E. (2d) 739, 743 (1955); *Horne v. Southern Ry. Co.*, 186 S. C. 525, 197 S. E. 31 (1938). Similarly *Glover v. Vance*, 188 F. (2d) 870 (C. C. A. 4th, 1951), and the *Hicklin* and *Horne cases, supra*, all hold that it must be foreseen that the negligence would **probably** result in injury of some kind to someone. Again *Boyleston v. Southern Ry. Co.*, 211 S. C. 232, 44 S. E. (2d) 537 (1947), holds that one cannot

be deemed responsible for "injuries which, though possible, were wholly improbable."

Respondent urges that injury from a camber maladjustment (assuming Ford's responsibility therefor) is wholly improbable in the light of the evidence before the Court. A small amount of excessive, but smooth and uniform tire wear might be a probability, but wear is inevitable in any event. To go further and say that injury is the probable result of maladjusted camber is entirely unwarranted in the light of what is known about these factors of adjustment. Granted it is a possibility, but possibility alone is not enough to establish legal causation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted.

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November 15, 1958.